In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1843

LEONARD CROW DOG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

In its Brief in Opposition for the United States, the Government relies on two actions taken by this Court after the Petition for Writ of Certiorari was prepared and filed. Defendant thus submits this Reply Brief to correct the Government's misstatements concening the impact on the instant case of *United States v. Agurs,* ..... U.S. ....., 49 L.Ed. 2d 342 (1976) and *Weatherford v. Bursey,* No. 75-1510, certiorari granted, June 21, 1976. Petitioner also corrects certain of the misstatements made by the Government concerning the facts of this case and the

reasons for issuing a Writ of Certiorari. Notably, the Government's "Statement" of the facts is unbalanced in view of the issues raised, in that it does not reveal the conflicts in the Government's evidence and the closeness of the question of whether that evidence supports the verdict. (Compare Br. Opp. at 2-4 with Pet. at 15-21 and 26-31.)[1] Finally, defendant also wishes to inform the Court of changes that have occurred in his status since he filed his Petition for Writ of Certiorari on June 21, 1976.

1. The Government has completely misunderstood and misstated the defendant's contentions concerning the Government's suppression of exculpatory evidence. Defendant's contentions are simple. Before, during and after trial, defendant made repeated demands for disclosure of exculpatory evidence in the Government's possession. (See Pet. at 8-9, 13-15, 20, 23-25.) A specific pretrial demand was made for:

> All photographs of possible suspects shown by members of any law enforcement organization to witnesses in connection with this case, including but not limited to those shown to witnesses before the grand jury, *plus any photographs or information concerning line ups, show ups or other identification procedures used in reference to the defendants* and the results thereof, and

[1]References to the Petition for Writ of Certiorari will be indicated as Pet.; references to the Brief for the United States in Opposition will be indicated as Br. Opp.; references to the Sentencing Transcript will be indicated a S. Tr.; references to the Motions Hearing Transcript will be indicated as Mot. Tr.; references to the Trial and "taint" hearing transcript will be indicated as Tr.; references to material in the Appendix to the Petition will be indicated as App.

> specifically to include the names and addresses of people who did not identify the defendants and of people who identified persons other than the defendants.
>
> (April 16, 1975 Motion for Discovery and Inspection at 6) (Emphasis added.)

Throughout the trial, and after trial, this motion was repeated with ever increasing specificity as the defense learned more concerning the existence of undisclosed photographs. (See Pet. at 24-25.) Despite these demands, an identifiable group of highly significant photographs was never disclosed to the defense.

The Government now contends that "the defense was given access to all such photographs." (Br. Opp. at 6.) This contention is false. The one record reference relied upon for the contention provides a statement by the prosecutor that demonstrates both that the identifiable group of photographs in question was shown to the prosecution witnesses, and that these photographs were never provided to the defense.

> Miss Schreiber: I would like to ask for the production of the pictures that he was originally shown.
>
> The Court: I think counsel said he has produced them.
>
> Mr. Hurd: No, Your Honor. There never has been any identification specifically as to what photographs were shown Mr. Graham on March 11, 1973. As near as we can tell there were a stack of photographs there of people who had been arrested in connection with Custer and the incident at Rapid City, and those were probably

the photographs that were shown to Mr. Graham, but there is no record that we have been able to uncover showing specifically what photographs were shown to the postal inspectors on March 11, 1973.

The Court: You don't have them.

Mr. Hurd: To our knowledge we don't. All photographs that we have, we have supplied defense counsel with.

(Tr. 270.)

The Government also continues to contend that it "could not [and presumably cannot] identify precisely the photographs shown to the postal inspectors. . . ." (Br. Opp. at 6.) In fact, however, no representative of the Government has ever under oath denied the existence of the photographs, nor has any representative of the Government testified under oath that the photographs in question cannot be identified and provided to the defense. (See Pet. at 24-25.) There is sworn probative evidence, on the other hand that: (1) the identifiable group of photographs exists; (2) these photographs can be re-assembled; (3) these photographs include pictures of the defendant; (4) these photographs were shown to the witnesses against the defendant on March 11, 1973, immediately upon their release; and (5) after being shown the photographs, the Government's witnesses did *not then* identify the defendant as a participant in the incidents in question. Most of this evidence has been recited in the Petition at 23-25, 15-19.

After the trial in the instant case, defendant's attorney received the file of another Wounded Knee

defendant. Included in that file was an F.B.I. 302 Report, concerning another incident occurring at Wounded Knee on March 11, 1973, the date of the events at issue in the instant case. According to the F.B.I. 302 Report, shortly after this other incident, the F.B.I. agents involved ". . . returned to the Command Post and both agents viewed 60 photographs of individuals who had been arrested at Custer, South Dakota." (Attachments to Motion for Post-Trial Relief, filed on July 25, 1975.)

Other evidence that such an identifiable group of photographs exists, can be reassembled and was shown on March 11, 1973 to the witnesses against the defendant in the instant case, is recited in the affidavit of Kenneth Tilsen which is attached to Defendant's Motion for Post-Trial Relief, filed on July 25, 1975.

The prosecutor has denied neither that such photographs exist, nor that they were shown to these witnesses. (See, e.g., Tr. 270; S. Tr. 12-13.) The prosecutor merely contended, in unsworn statements, that the photographs in question cannot now be reassembled and that the defendant's picture probably was not included among these photographs. (See, e.g., S. Tr. 12-13.)

Never having been provided this group of photographs, the defendant cannot be certain that they included pictures of him. However, the defendant, through his trial attorney's affidavits, has presented evidence both that the stack of 60 photographs can be specifically identified and reassembled, and that the defendant's picture was included in that stack. In

fact, these affidavits provide Government photograph identification numbers which can be used to reassemble the group of photographs with no difficulty. (Affidavit of Kenneth Tilsen attached to Motion for Post-Trial Relief, filed July 25, 1975; Supplemental Affidavit [of Kenneth Tilsen] and Reply to Government's Response to Defendant's Motion for Post-Trial Relief.)

On this state of the record, at the very least the trial court should have conducted an evidentiary hearing to determine, through adversary process, whether the photographs exist, whether they can be re-assembled, and whether defendant's picture is included in this group of photographs. Contrary to the Government's naked assertion (Br. Opp. at 6), no evidentiary hearing was ever conducted to answer these questions. The evidentiary hearing to which the Government appears to be referring, was a three-day hearing on pretrial motions which the trial court limited at the outset to consideration of the defendant's ". . . motions to dismiss that pertain to the bad faith prosecution and the discriminatory prosecution and government's misconduct . . . and the speedy trial motion. . . ." (Mot. Tr. 11.)[2]

[2]The Record, especially of this three-day hearing, which specifically incorporated testimony conducted in collateral but related proceedings, is replete with evidence, contrary to the Government's denials (Br. Opp. at 5 n. 5), of the Government's willful misconduct in the instant case as well as in related cases.

Further, each of the issues presented for review involves evidence and contentions of government misconduct. Obviously this is true of the issues which concern failure to disclose exculpatory evidence and invasion by Government informers of defense legal councils. The Government's systematic failure to record the grand jury testimony of law enforcement officers also involves willful Government misconduct. Surely the practice is not unintentional. Its purpose must be to gain an improper and unnecessary advantage by *not* locking its witnesses into positions that may not help and may even injure the Government's position at trial.

The Government has completely misread *United States v. Agurs*, ... U.S. ....., 49 L. Ed. 342 (1976). If defendant's factual contentions are substantiated after an evidentiary hearing, under *Agurs* he most certainly would be entitled to a new trial.[3]

Under *Agurs*, the defendant in the instant case is entitled to the benefit of the strict standard in determining whether his rights to due process have been violated. Just as in *Brady v. Maryland*, 373 U.S. 83 (1963), in the instant case defendant's "request was specific", 49 L.Ed. 2d at 351. Hence, under *Agurs* the prosecutor was under virtually an absolute duty to disclose the photographs requested "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists. . . ." 49 L.Ed. 2d at 351.

There can be no question that the defendant's request for the photographs in question met this standard of materiality. Even under the less strict due process standard, to be employed in cases in which no specific request was made for the exculpatory

[3]If, despite the existing evidence to the contrary, the trial court were to conclude after an evidentiary hearing that it was not possible to re-assemble the stack of photographs in question, we submit that it would then have to decide whether due process and the supervisory powers of the federal courts require that the indictments against the defendant be dismissed.

evidence in question, the Court recognized that "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 49 L.Ed. 2d at 355. In the Petition the defendant explores at some length the reasons why the verdict in the instant case "is already of questionable validity. . . ." (*Id.*) See Pet. at 26-31, 15-19.

On the record in this case, therefore, it would be appropriate at the very least for this Court to grant the Writ of Certiorari to determine whether under *Agurs* the prosecutor adequately submitted the problem, through unsworn self-serving statements, to the trial judge, and whether the trial judge fulfilled his obligation when he required no evidentiary hearing on the defendant's contentions. (See 49 L.Ed. 2d at 351.) Alternatively, the Court might vacate and remand the case to the courts below for a reconsideration of these issues in the light of *Agurs.*

2. Defendant also resists the Government's suggestion that this case is unrelated to and cannot be controlled by this Court's impending decision in *Weatherford v. Bursey,* No. 75-1510, certiorari granted June 21, 1976. (Br. Opp. at 13 n. 12.)

Weatherford, like the instant case, involves the legal consequences resulting from invasion of a defendant's legal councils by Government informers. As the Government appears to recognize, the instant case raises the question whether *in camera* examination of the file by the courts, instead of an adversary hearing, is adequate to determine whether a defendant's

right to counsel has been violated by a Government informer's invasion of defense legal councils. (Br. Opp. at 12 n. 11.) That question is not raised in *Weatherford,* and the Government cites no authority for its declaration that "such an examination is sufficient where the court determines that the file in question contains no relevant information" (Br. Opp. at 12 n. 11.)

The Government has filed a brief *amicus curiae* in *Weatherford* and has moved to participate in oral argument. In its Motion to Participate in Oral Argument, the Government specifically recognizes that this Court's decision in *Weatherford* will affect "cases other than this one. . . ." In the Brief for the United States as Amicus Curiae at p. 2, the Government further states as a primary reason for its intervention in *Weatherford* its appreciation that

> . . . the decision in this case will elucidate the constitutional norms governing the conduct of law enforcement investigative efforts whenever undercover agents or confidential informants are employed, and the need to preserve their "cover" comes into potential conflict with the confidentiality of defense planning in a criminal case.

Since the instant case raises such issues, many of which are different from but related to those involved in *Weatherford,* defendant submits that this Court might well grant the Writ of Certiorari in the instant case and order an expedited briefing schedule so that argument can be conducted in tandem with the argument in *Weatherford.*

If the Court does not believe immediate review is warranted, a decision in this case might well be held pending decision in *Weatherford,* so that the Court then could decide if its decision in *Weatherford* requires further action in this case.

3. Defendant agrees with the position of the Government with respect to the proper treatment at this time of the Court of Appeals' reversal of the conviction of one of defendant's co-defendants because of a defect in the indictments. *United States v. Camp,* C.A. 8, No. 75-1955. (Br. Opp. at 8-9 n. 7.) Defendant does not agree with the Government's suggestion that the invalidity of Count I of his indictment could provide him with no relief under Count II. However, he accepts the Government's representation that he can "raise the issue in a motion filed pursuant to 28 U.S.C. §2255." (Br. Opp. at 8 n. 7.) Thus, at this time, this Court should not consider the issue raised by the Court of Appeals' decision in *Camp.*

4. Since the Petition for Writ of Certiorari was filed, defendant's situation has changed in several respects. First, on June 17, 1976, the Court of Appeals affirmed his conviction of the offense committed subsequently to his conviction in the instant case. C.A. 8 No. 75-1934. No Petition for Writ of Certiorari was filed.[4] The sentencing court in that case had

[4]Contrary to the Government's statement (Br. Opp. at 3 n. 2), subsequent to his instant conviction, defendant was convicted of one, not two, offenses committed while he was on probation. He was also subsequently convicted of an offense which had been committed prior to the instant conviction and sentencing. No term of imprisonment was imposed for that offense.

imposed a five year prison term for one count and a consecutive five year prison term on the second count, but had suspended execution of the sentence on the second count and ordered that defendant be placed on probation upon his release from imprisonment on the first count. On September 30, 1976, the sentencing court issued an Order pursuant to Rule 35 of the Federal Rules of Criminal Procedure reducing the sentence on the first count to time served and placing defendant on five years' probation upon his release from prison.

Second, on October 21, 1976, again pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the sentencing court in the instant case reduced defendant's sentence to concurrent three year terms on each of the two counts for which he was convicted. The sentencing court also rendered defendant immediately eligible for parole. Defendant and his counsel have been informed by the Federal Bureau of Prisons that a parole hearing will be conducted at the Federal Penitentiary at Terre Haute, Indiana on December 10, 1976.

CONCLUSION

For the foregoing reasons, as well as those submitted in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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